

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRANK OMOBUDE

PLAINTIFF

VS.

CIVIL ACTION NO.: 3:10CV703TSL-FKB

MISSISSIPPI DEPARTMENT OF
FINANCE AND ADMINISTRATION,
KEVIN UPCHURCH, Executive Director;
CILLE LITCHFIELD, officially and individually;
CLYDE MURREL, officially and individually;
PERRY DUBARD, officially and individually;
and UNKNOWN JOHN DOES 1 - 5

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Kevin Upchurch, in his official capacity, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Frank Omobude has responded to the motion and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that the motion is well taken and should be granted.

Pursuant to 42 U.S.C. § 1983, Omobude seeks reinstatement to his employment with the Mississippi Department of Finance Administration (MDFA) based on allegations he was terminated on account of his race and/or as the result of retaliation for complaints of harassment. Defendant Upchurch seeks summary judgment, arguing that plaintiff cannot establish a *prima facie* case of discrimination or retaliation, but that even if he could, he cannot establish pretext or show that race or retaliation was a motivating factor in the decision to terminate plaintiff's employment.

Under the familiar McDonnell-Douglas burden-shifting framework that governs § 1983 race discrimination claims, a plaintiff challenging a failure to promote must first establish a *prima facie* case, by proving that he was: (1) a member of a protected group; (2) qualified for the position; (3) suffered some adverse employment action; and (4) was treated less favorably than a similarly situated employee outside the protected class or was otherwise terminated because of a protected characteristic. See Autry v. Fort Bend Independent School Dist., 704 F.3d 344, 347 (5th Cir. 2013). Once the plaintiff makes a *prima facie* case, the burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the employment action. Id. If the employer does so, the plaintiff must offer sufficient evidence to create an issue of material fact that either the defendant's stated reason is not genuine, but is a pretext for discrimination (the pretext alternative), or that the decision was based on "mixed motives," and that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's race (the mixed-motives alternative). Id.

Plaintiff's retaliation claim is also subject to the McDonnell-Douglas analytical framework. To establish a *prima facie* case of retaliation, plaintiff must show that: (1) he engaged in a protected activity; (2) his employer took an adverse

employment action against him; and (3) a causal connection exists between the protected activity and the adverse employment action. Gibson v. Verizon Servs. Organization, Inc., 2012 WL 5914256, 5 (5th Cir. Nov. 15, 2012). The burden then shifts to the employer to show a legitimate, non-discriminatory reason for the adverse action, and if it does so, the plaintiff must show that the proffered reason was a pretext or that the employer acted with mixed motives. Id.

Even if the court in this case were to assume that Omobude could establish a *prima facie* case of race discrimination and/or retaliation, his claims would fail as he has adduced no evidence that would permit a reasonable jury to find that the reasons offered by his former employer Mississippi Department of Finance and Administration (MDFA) for terminating his employment are pretextual, or that race or retaliation was a factor that motivated MDFA's decision. Plaintiff was informed by letter in January 2008 that a decision had been made to terminate his employment based on findings that he had threatened violence against his supervisor¹ and had violated MDFA's Telephone and Information Technology Resources Policies and Procedures. Plaintiff appealed the decision to the Mississippi Employee Appeals Board (Board) which upheld the decision. Initially,

¹ Specifically, MDFA found that in October 2007, plaintiff had commented to a coworker that he was so stressed he might bring a gun to the workplace and shoot his supervisor.

following a hearing and review of reports by an independent investigator hired by MDFA to investigate both Omobude's own allegations of hostile work environment and allegations of misconduct by Omobude, the hearing officer found there was substantial evidence to support Omobude's termination based on the alleged threat of workplace violence. He found, in particular, that although Omobude denied having made such a threat, MDFA had to decide whom to believe and was justified in believing the witness who reported Omobude's threat. The full Board affirmed the hearing officer's decision.

In his response to the present motion, plaintiff undertakes to demonstrate that the reasons given by MDFA for his termination are false and pretextual. Toward that end, he asserts that in a justice court proceeding initiated against him by his former supervisor, the court deemed him not guilty of the charge of threatening harm to his supervisor and found there was no evidence that he made the alleged threat. However, while the abstract of justice court proceedings presented by plaintiff reflects a judgment of not guilty, it does not indicate what evidence was presented to the court and more specifically, does not reflect that there was "no evidence" of a workplace threat. In any event, the relevant inquiry in this case is not Omobude's guilt or innocence of the charge that he made a threat of workplace violence; rather the proper inquiry is whether MDFA believed that

such a threat was made and terminated him for that reason. Plaintiff has offered no evidence to suggest that this is not what in fact occurred, and he thus has failed to demonstrate pretext.² He has otherwise offered no evidence from which a jury might reasonably infer that his race or retaliation was a motivating factor in the decision to terminate his employment. Accordingly, his remaining claims for race discrimination and retaliation will be dismissed.

Based on the foregoing, it is ordered that Upchurch's motion for summary judgment is granted.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 5th day of March, 2013.

/s/ Tom S. Lee

UNITED STATES DISTRICT JUDGE

² In his response, Omobude argues that MDFA was not warranted in relying on the credibility assessment made by the independent investigator who investigated Omobude's alleged threat against his supervisor since the investigator's "objectivity is questionable" and since he offered only "his view which was not in many cases fact based but [was instead based on] his impressions and perceptions." However, plaintiff has offered no factual basis for challenging the investigator's objectivity. Moreover, as evidenced by his detailed report, the investigator thoroughly investigated the allegation against Omobude and made a complete report to MDFA of his findings in which he explained in full the reasons he found the allegation to be well-founded. Plaintiff has not shown that MDFA was not justified in relying on the results of the investigation and reaching a conclusion based, in whole or in part, on the investigator's reasoning.